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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND
RULES 10.1 AND 10.6 OF THE
RULES OF CRIMINAL PROCEDURE

Supreme Court No. R-13-_____

Pursuant to Rule 28, Rules of the Supreme Court, Mike Palmer, a member of the public deeply concerned about justice,¹ petitions this Court to adopt the proposed amendments to Rule 10.1(c) & Rule 10.6 of the Rules of Criminal Procedure governing change of judge for cause.

The purpose of the proposed amendment is to prevent an unjust, unanticipated outcome due to ambiguity in the Rules. As it stands now, in the worst case, a small town judge, who is his own presiding judge, can legitimately cite Rule 10.1(c) to illegitimately thwart a litigant's constitutional right to a change of judge for cause.

¹ Per Amos 5:15 in the Bible: "Hate evil, love good. Maintain justice in the courts."

I. Background and Purpose of the Proposed Rule Amendment

Rule 10.1(c) & Rule 10.6 collectively prescribe the procedure the courts are to follow after a litigant has filed a motion pursuant to Rule 10.1(b) for a change of judge for cause. But there appears to be some ambiguity in the Rules about the responsibilities of a presiding judge in Rule 10.1(b) motions.

While the two Rules seem straightforward enough, they appear to have been written with “Big City” courts in mind. In the Big City, a presiding judge presides over other judges. In a small town, a presiding judge presides over himself, simply because he is the only judge. The way the Rules are currently written, there can be an unintended result in the small towns that dot Arizona. A real world example demonstrates the problem.

Take the criminal case of *State v. Gilford* in the small town of Quartzsite. According to a press release from the Quartzsite Prosecutor, Mr. Gilford was one of five “self-styled activists.” As a result of his “activism,” Mr. Gilford was facing 13 criminal counts before judge Larry King in the Quartzsite Municipal court.

It would be an understatement to say there were many irregularities in Quartzsite, including the Quartzsite Municipal Court.² To wit, while Mr. Gilford's

² Corruption in Quartzsite has been featured in *The Arizona Republic*, *The Wall Street Journal*, *USA Today*, and YouTube.

case was still in its early stages, certain events in the criminal case of another named activist, the mayor of Quartzsite, gave Mr. Gilford pause about the lack of independence between the Judicial branch and the Executive in Quartzsite. And therefore, about Judge King's impartiality.

A pro se litigant at the time, Mr. Gilford filed a timely Rule 10.1 motion for change of judge for cause along with the required affidavit for same.

Skipping over more irregularities (or maybe not so irregular if you focus too closely on the last sentence in Rule 10.6), Judge King at first did not abide by the spirit of Rule 10.6 to “proceed no further” in Mr. Gilford's case. (Perhaps “continuing to perform his duties as presiding judge”?) It was only when, after a Special Prosecutor (at a subsequent pretrial conference) told Judge King the same thing that Mr. Gilford had been telling the judge (that a Rule 10.1 motion was in play), that Judge King finally stepped back and assigned a hearing judge.

The hearing judge set up an evidentiary hearing for Mr. Gilford's motion and afterward recommended Mr. Gilford be assigned a new judge. (Exhibit 1.)

Unfortunately, the hearing judge made a small typo in her Recommendation. While the judge clearly recommended a change of judge in her memorandum, she mistakenly wrote “there could be a presumption of impartiality by the court.” (Instead of “partiality.”)

Nevertheless, the hearing judge's intent was clear, and—at first—another judge, presumably the “designee” judge of Rule 10.6, issued an Order Granting Mr. Gilford's Motion for a Change of Judge. (Exhibit 2.)

But then the designee went back and parsed Rule 10.1. As a result, she nullified her first Order with an unusual Nunc Pro Tunc. Specifically, she noted that paragraph (c) of Rule 10.1 says that "The hearing judge shall decide the issues . . . and return the matter to the **presiding judge** who shall as quickly as possible assign the action back to the original judge or make a new assignment" (emphasis mine.) Exhibit 3.

While that's a literal reading, it's not the intent of the Rule. While the word “designee” does not appear in Rule 10.1(c), the intent of Rule 10.1(c) (based on Rule 10.6) is for the hearing judge to return the matter to the presiding judge—OR, if the presiding judge is the named judge, then return the matter to the presiding judge's designee for a decision on whether to return the matter to the “original (named) judge” or not,

Unfortunately, the designee judge apparently overlooked the part of Rule 10.6 about transferring the matter “to the presiding judge **or the presiding judge's designee.**” (Or perhaps Judge King never formally designated a “designee”? There's nothing in the record about it.) Instead of focusing on “designee” in Rule

10.6, the designee judge narrowly focused on the last sentence in Rule 10.6. In her corrected order she quoted ". . . if the named judge is the presiding judge, that judge shall continue to perform the function of the presiding judge."

While again that's a literal reading of the Rule, it's not its intent. The intent of that sentence is to say that if a presiding judge was the named in a Rule 10.1 motion for change of judge, the filing of the motion does not mean the presiding judge must step down from performing his normal managerial functions in other matters.

In the end, though, because Judge King was the only judge in the Quartzsite Municipal court, the designee judge concluded "the find[ing]s of the [hearing judge] shall be transmitted to the Presiding Judge of the Quartzsite Municipal Court for determination of what further action is needed in this matter."

And she returned the recusal matter to the "presiding judge." Judge King! As a result, Judge King ruled on himself, deciding he wasn't biased, citing the hearing judge's typo for his grounds. (Exhibit 4.)³

³ Judge King's usurpation was reported to the Commission on Judicial Conduct. But the Commission did not consider this an ethics violation and so did not correct Judge King. (See Case No. 12-135) This makes a Rule change all the more necessary.

But that can't be right on its face. For it violates an axiomatic rule of jurisprudence that “no man can be a judge in his own case.” *Caperton v. Massey Coal*, 129 S. Ct. 2252, 2261 (2009). It also violates Rule 10.6. “When a motion or request for change of judge is timely filed under this rule, the judge shall proceed no further in the action . . .”

Clearly the spirit of Rules 10.1 & 10.6 does not allow for this outcome. And while common sense and an abundance of caution dictate that a judge caught in this ambiguity must step down and ask another judge to make this Rule 10.1(c) decision (especially in light of Rule 2.11 “Disqualification” in the Code of Conduct), as Judge King himself has said in open court: “Common sense doesn't work in Quartzsite.” So we must spell things out to keep this from happening again.⁴

To that end, I offer the following changes to Rule 10.1(c) & 10.6. Further, I submit that Rule 10.6 be deleted and pasted twice instead as new Rules 10.1(d) and

⁴ Fortunately, in the end, the new judge dismissed all charges against Mr. Gilford because the State had failed to make a prima facie case.

But poor Mr. Gilford had to hire a lawyer who moved for Judge Weis to clarify her typo in her recommendation. After she corrected the typo and issued a corrected Order, Judge King finally disqualified himself. (“Transferred” the case as he put it.) Still, in violation of Rule 10.6, he continued to proceed further by assigning his own choice for a judge, an apparent pal from Paradise Valley, where they both live.

10.2(e) so as to not be overlooked while reading what currently appear to be stand-alone Rules 10.1 & 10.2.

Further, I submit the Rules should require the designee be a presiding judge from an outside court (as opposed to a subordinate) so as to minimize claims of the “Good ol’ boy network” by the public if the designee finds for his named judge.

In the small town scenario, this will mitigate a named small town judge being able to pick a friend to determine if the named judge is biased. In the Big City scenario, this will mitigate the pressure a subordinate will be under if he rules against his superior. In both scenarios, this will help promote the public's confidence in the judiciary.

II. Contents of the Proposed Rule Amendment

Rule 10.1 Change of judge for cause

c. Hearing. Promptly after the filing of the motion, the presiding judge, or his designee if the presiding judge is the named judge, shall provide for a hearing on the matter before a judge other than the judge challenged. (If a designee is required, the designee shall be a presiding judge from outside the jurisdiction of the named presiding judge.) The hearing judge shall decide the issues by the preponderance of the evidence and following the hearing, shall return the matter to the presiding judge or his designee if the presiding judge is the named judge, who shall as quickly as possible assign the action back to the original named judge or make a new assignment, depending on the findings of the hearing judge. If a new assignment is to be made it shall be made in accordance with the provisions of this rule.

d. Duty of judge upon filing of motion or request under Rule 10.1 When a motion or request for change of judge is timely filed under this rule, the named

judge shall proceed no further in the action, except to make such temporary orders as may be necessary in the interest of justice before the action can be transferred to the presiding judge or the presiding judge's designee if the presiding judge is the named judge. However, if the named judge is the presiding judge, ~~he judge~~ shall continue to perform the normal managerial functions of the presiding judge except for the instant action, which is to be handled by an outside designee.

[Note that new proposed Rule 10.1(d) is in itself an amended version of old Rule 10.6. I have annotated the original text of Rule 10.6 below as a courtesy to highlight the new text I added to that Rule before pasting it as new Rule 10.1(d).

When a motion or request for change of judge is timely filed under this rule, the named judge shall proceed no further in the action, except to make such temporary orders as may be necessary in the interest of justice before the action can be transferred to the presiding judge or the presiding judge's designee if the presiding judge is the named judge. However, if the named judge is the presiding judge, ~~he judge~~ shall continue to perform the normal managerial functions of the presiding judge except for the instant action, which is to be handled by an outside designee.]

Rule 10.6 Duty of judge upon filing of motion or request under Rules 10.1 or 10.2 Deleted

~~When a motion or request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be necessary in the interest of justice before the action can be transferred to the presiding judge or the presiding judge's designee. However, if the named judge is the presiding judge, that judge shall continue to perform the functions of the presiding judge.~~

Rule 10.2 Change of judge upon request

d. Duty of judge upon filing of motion or request under Rule 10.2 When a motion or request for change of judge is timely filed under this rule, the named judge shall proceed no further in the action, except to make such temporary orders as may be necessary in the interest of justice before the action can be transferred to the presiding judge or the presiding judge's designee if the presiding judge is the named judge. However, if the named judge is the presiding judge, he judge shall continue to perform the normal managerial functions of the presiding judge except for the instant action, which is to be handled by an outside designee.

SUBMITTED this 10th day of January, 2013

By /s/ Mike Palmer
Mike Palmer
18402 N. 19th Ave., #109
Phoenix, AZ 85023

EXHIBIT 1

IN THE JUSTICE COURT OF THE STATE OF ARIZONA
-IN AND FOR THE COUNTY OF LA PAZ

STATE OF ARIZONA,
Plaintiff,

vs.

DOUGLAS CLYDE GILFORD,
Defendant.

CASE NO: **CR 2011-0103**
CR 2011-0097

RECOMMENDATION

The Evidentiary Hearing on Motion for Change of Judge having been held in the
Quartzsite Justice Court.

The State represented by Town Prosecutor Attorney Tom Jones and Defendant Douglas
Clyde Gilford appeared pro se.

Testimony was heard from all Parties. Supplemental Affidavit of Support of Rule 10.1
Motion for Change of Judge was filed by Defendant Douglas Clyde Gilford.

The Court having heard testimony from both parties and review of all files pertaining to
Rule 10.1.

It is therefore the conclusion that upon the preponderance of the evidence that there
could be a presumption of impartiality by the Court. Therefore it is my recommendation
that a new Judge be appointed. A Judge must act at all times in a manner that promotes
public confidence and to avoid even the appearance of impropriety.

DATED this 30 day of APRIL 30, 2012.

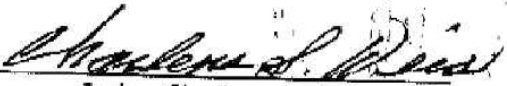

Judge Charlene S. Wels
Justice of the Peace
Precinct # 1504

EXHIBIT 2

IN THE QUARTZSITE JUSTICE COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF LA PAZ

| | | |
|------------------------|---|---|
| State of Arizona, |) | QUARTZSITE MUNICIPAL COURT |
| |) | CASE NUMBERS: <u>M1541-CR2011-0103</u> |
| |) | <u>M1541-CR2011-0097</u> |
| Plaintiff |) | |
| vs |) | |
| DOUGLAS CLYDE GILFORD, |) | ORDER GRANTING MOTION |
| |) | FOR CHANGE OF JUDGE |
| Defendant |) | |
| _____ |) | |

This case came before the La Paz County Justice Court Presiding Judge on a Motion for Change of Judge for Cause pursuant to Rule 10.1.

Rule 10.1 allows for a change of judge if a "fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned Judge." A Trial Judge is presumed to be free of bias and prejudice (State v. Rossi, 154 Ariz. 245 and State v. Perkins, 141 Ariz. 278) and a defendant must present concrete facts and specific allegations to the Court. The hearing judge must then determine by a preponderance of the evidence (i.e. that which is more likely than not) if the current judge should be removed for cause. Further, Arizona's separation of powers doctrine requires that magistrates be allowed to perform their judicial functions as independent decision-makers. Winter v. Coor, 144 Ariz. 56, 695 P.2d 1094 (1985).

The Honorable Judge Weis, having held a hearing on the matter and having found by a preponderance of the evidence that there "could be a presumption of impartiality by the court, and having recommended a new judge be appointed,

IT IS ORDERED GRANTING DEFENDANT'S MOTION FOR CHANGE OF JUDGE.

EXHIBIT 3

IN THE QUARTZSITE JUSTICE COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF LA PAZ

STATE OF ARIZONA,

Plaintiff

vs.

DOUGLAS CLYDE GILFORD,

Defendant

QUARTZSITE MUNICIPAL COURT

Case Numbers: M1541-CR2011-0103

M1541-CR2011-0097

**ORDER GRANTING MOTION FOR
CHANGE OF JUDGE
NUNC PRO TUNC ADDITION AND
CORRECTION TO MINUTE ENTRY AND
ORDER**

ADDITION. The Court's April 30, 2012, Order in this matter reflects the determination of Motion for Change of Judge that was referred to this Court by the Quartzsite Municipal Court. Upon further review of Rule 10, this Court finds that it should have simply returned the findings to the Quartzsite Municipal Court for the following reasons.

Rule 10.1, Change of judge for cause, provides in paragraph c. that "The hearing judge shall decide the issues by the preponderance of the evidence and following the hearing, shall return the matter to the presiding judge who shall as quickly as possible assign the action back to the original judge or make a new assignment, depending on the findings of the hearing judge."

Rule 10.6 outlines the duty of judge upon filing of motion or request under Rules 10.1 or 10.2. It provides that "...if the named judge is the presiding judge, that judge shall continue to perform the functions of the presiding judge." The Court finds that the name judge in this matter is Judge Lawrence King, the Presiding Judge of the Quartzsite Municipal Court. Therefore, the finds of the Honorable Judge Weis shall be transmitted to the Presiding Judge of the Quartzsite Municipal Court for determination of what further action is needed in this matter.

CORRECTION. The Orders Granting Defendant's Motion for Change of Judge and the Order assigning the matter to Judge Karen Slaughter are not consisted with the procedure outlined in Rule 10.

IT IS ORDERED that the Order granting Defendant's Motion for Change of Judge is **VACATED.**

IT IS FURTHER ORDERED that the Order assigning Judge Karen Slaughter to the case effective immediately is **VACATED.**

IT IS FURTHER ORDERED that the Honorable Judge Weis' findings shall be immediately transmitted to the Presiding Judge of the Quartzsite Municipal Court.

The balance of the minute entry remains the same.

SO ORDERED this 2 day of May, 2012



E.M. "Beth" Williams, Presiding JP, La Paz County
Justice of the Peace, JP 1504

EXHIBIT 4



IN THE MUNICIPAL COURT OF
THE TOWN OF QUARTZSITE, STATE OF ARIZONA

CR2011-0097
CR2011-0103

5/8/2012

STATE OF ARIZONA

v.

DOUGLAS CLYDE GILFORD

MINUTE ENTRY

State's Attorney: Thomas Jones
Defendant: Marc J. Victor

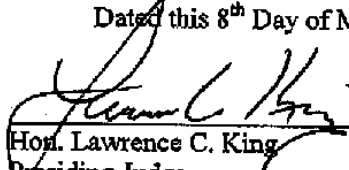
The Court has received a Motion for Change of Judge for Cause pursuant to Rule 10.1 of the Arizona Criminal Rules of Criminal Procedure. The matter was heard by the Honorable Charlene S. Weis.

A defendant's right to a fair trial includes the right to a judicial officer who is fair and impartial. *State v. Ellison*, 213 Ariz. 116, 128, ¶ 35, 140 P.3d 899, 911 (2006). Judicial officers are presumed to be free from bias or prejudice, however. *State v. Rossi*, 154 Ariz. 245, 247, 741 P.2d 1223, 1225 (1987). Thus, a defendant moving for a change of judge for cause based on bias or prejudice has the burden of proving those facts by a preponderance of evidence. *Ellison*, 213 Ariz. at 128, ¶ 37, 140 P.3d at 911 (citation omitted). A change of judge for cause is not warranted if based merely on "speculation, suspicion, apprehension, or imagination." *Id.* (citation omitted).

Judge Weis found that "upon the preponderance of the evidence that there could be a presumption of impartiality by the Court." Mr. Douglas C. Gilford did not meet his burden of proving by a preponderance of the evidence that Judge King is biased or prejudiced.

IT IS ORDERED the above captioned matters shall remain assigned to Judge King.

Dated this 8th Day of May 2012.


Hon. Lawrence C. King
Residing Judge